PETROLIAM NASIONAL BHD (PETRONAS) & ORS

v.

KHOO NEE KIONG

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[CIVIL SUIT NO: 22-623-2001]
5 JULY 2003

CIVIL PROCEDURE: *Injunction - Interim injunction - To restrain publication of defamatory email and statements on the internet - Whether defendant sufficiently identified - Whether defendant the registrant and operator of impugned websites - Whether impugned email was sent by defendant - Whether impugned email and statements were defamatory - Whether plaintiffs suffered damage - Whether interim prohibitory injunctions should be granted*

CIVIL PROCEDURE: *Injunction - Interim injunction - To restrain passing off of internet domain names - Whether there was a serious issue to be tried - Whether defendant falsely represented that his company was associated with plaintiffs' company - Whether impugned domain names were instruments of fraud the use of which resulted in passing off - Whether interim prohibitory injunctions should be granted*

EVIDENCE: *Documentary evidence - Documents produced by computer - Application by plaintiffs for interim injunction to restrain defendant from publishing defamatory email and statements - Whether mandatory for plaintiffs to exhibit certificate under s. 90A Evidence Act 1950 for computer printouts containing allegedly defamatory email and statements - Whether plaintiffs had to establish prima facie case or only show bona fide serious question to be tried - Whether deponent of plaintiffs' affidavit-in-support had personal knowledge of its contents - Whether disputed by defendant in affidavit-in-reply*

TORT: *Defamation - Libel - Electronic publication - Internet - Application for interim injunction to restrain publication of defamatory email and statements on the internet - Whether defendant sufficiently identified - Whether impugned email and statements were defamatory and untrue - Whether plaintiffs suffered damage*

TRADEMARKS: *Passing off - Internet domain names - Whether an intellectual property - Application for interim injunction to restrain passing off of internet domain names - Whether there was a serious issue to be tried - Whether defendant falsely represented that his company was associated with plaintiffs' company - Whether impugned domain names were instruments of fraud the use of which resulted in passing off*

This was an *inter partes* application by the plaintiffs (Petroliam Nasional Berhad (PETRONAS), Petronas Dagangan Berhad and Petronas Gas Berhad) for interim prohibitory and mandatory injunctions to: (i) restrain the defendant from dealing in or passing off any internet domain names that contain the word 'petronas'; (ii) restrain the defendant from publishing or posting certain statements ('the impugned email') which the plaintiffs considered defamatory; and (iii) compel the defendant to transfer the domain name 'petronasgas.com' to the plaintiffs.

The defendant was an individual carrying on business as a sole proprietor under the trade name Araneum Consulting Services. The plaintiffs contended that the defendant had registered the domain names 'petronas-dagangan.com', 'petronasgas.com', 'mypetronasdagangan.com' and 'mypetronas.com' and was offering them for sale *via* the email address 'araneum@email.com'. It was contended that the defendant also maintained a website called 'Search Malaysia' at the url www.petronasgas.com. The plaintiffs further contended that the webpages of 'Search Malaysia', which were also accessible *via* the url www.searchmalaysia.com, had described 'petronasgas.com' as a subsidiary of 'searchmalaysia.com'.

The plaintiffs thus submitted that the defendant had misrepresented to the public and the business world that the websites operated by the defendant under or linked to domain names that incorporated the word 'petronas' were maintained or authorised by and/or connected to the plaintiffs; and that the defendant and his business were connected to or associated with the plaintiffs and/or that the products and services of the defendant were connected to or associated with the products and services of the plaintiffs or, alternatively, originated from or were those of the plaintiffs. It was the plaintiffs' case that this deception had caused confusion in the business world and amongst the public, as a consequence of which they suffered damage.

Held (allowing the application):

[1] The plaintiffs had shown that the name in the impugned email was that of the defendant, that the defendant was the sole proprietor of Araneum Consulting Services, and that both the websites www.petronasgas.com and www.searchmalaysia.com were operated by Araneum Consulting Services. They had also shown that the reliable search engine 'better-whois.com' yielded search results which indicated that either the defendant or Araneum Consulting Services was the registrant of the domain names 'petronas-dagangan.com', 'petronasgas.com', 'mypetronasdagangan.com' and 'mypetronas.com'. From the evidence, the defendant was most probably the person who had set up the websites www.petronasgas.com and www.searchmalaysia.com and sent the impugned email. Hence, the plaintiffs had sufficiently identified the defendant for the purpose of the injunctive relief they sought. (pp 318 e-g, 319 a-h, 320 a-g, 321 a-b & 323 b-c)

[2] It was **not** mandatory for the plaintiffs to exhibit a certificate (pursuant to s. 90A of the Evidence Act 1950) in respect of the computer printouts containing the impugned email and statements. The plaintiffs only had to show a *bona fide* serious question to be tried at this stage of the proceedings; they did not have to establish a *prima facie* case. The deponent of the plaintiffs' affidavit-in-support had deposed that the contents of the affidavit were within his personal knowledge; and this was not challenged or disputed by the defendant in his affidavit-in-reply. (pp 324 d-f, 325 h & 326 a)

[3] The impugned email and statements were manifestly defamatory and obviously untrue. Their natural and ordinary and inferential meanings were, *inter alia*, that the plaintiffs had no lawful claim to domain names that contain the word 'petronas'; that they were oppressive, intimidating and extortionate to other local businesses; and that they were high-handed, arrogant, ignorant, incompetent and like robbers. The impugned email and statements were calculated to injure and disparage the plaintiffs' reputation, lower them in the estimation of right-thinking members of society, and bring them into public scandal, odium and contempt. The plaintiffs had also shown that the impugned email and statements were published to ICANN (Internet Corporation for Assigned Names and Numbers), at www.petronasgas.com and www.searchmalaysia.com, and on the prominent Malaysian newsgroup 'soc.culture.malaysia'. The plaintiffs had suffered irreparable loss and damage, and grave injury to their trading personality and reputation. Hence, the interim prohibitory injunctions sought should be granted to restrain the defendant from further defaming the plaintiffs on the internet or elsewhere. (pp 328 g-h, 329 a-h, 330 a-g & 331 a-d)

[4] By registering domain names that contain the word 'petronas', a serious issue to be tried had arisen as to whether the defendant was making the false representation that Araneum Consulting Services was connected to or associated with the plaintiffs or was the owner of the goodwill in the name PETRONAS (the statutory acronym for Petroleum Nasional Berhad). Further, the said domain names were instruments of fraud and any realistic use of them as domain names would result in passing off. Hence, the interim prohibitory injunctions sought should be granted to restrain the defendant from passing off any domain names that contain the word 'petronas'. (pp 335 g-h & 336 a-d)

[5] The plaintiffs' prayer for an interim mandatory injunction had become irrelevant. This was because the WIPO Arbitration and Mediation Center had, upon hearing the plaintiffs complaint, ordered the domain name 'petronasgas.com' to be transferred to the plaintiffs. (p 314 a-c)

[Plaintiffs' application allowed; interim prohibitory injunctions issued.]

Case(s) referred to:

AG Spalding Bros v. AW Gamage Ltd [1915] 84 LJ Ch 449 ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

American Cyanamid v. Ethicon Ltd [1975] AC 396 ***(refd)***

Bonnard v. Perryman [1891] 2 Ch 269 ***(refd)***

British Telecommunications plc & Anor v. One In A Million Ltd & Ors And Other Actions [1998] 4 All ER 476 ***(foll)***

Company of Proprietors of Selby Bridge Ltd v. Sunday Telegraph Ltd [1966] 197 Estates Gazette 1077 ***(refd)***

D and L Caterers Ltd and Jackson v. D'Aiou [1945] KB 364 ***(refd)***

Directors of Imperial Gas Light and Coke Co v. Broadbent [1859] 7 HL Cas 600 ***(refd)***

Frank Reddaway & Co Ltd v. George Banham & Co Ltd [1896] AC 1999 ***(refd)***

Fullwood v. Fulwood [1878] 9 Ch D 176 ***(refd)***

Gnanasegaran Panarajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor [1995] 1 CLJ 293 CA ***(refd)***

Leather Cloth Co Ltd v. American Leather Cloth Co Ltd [1865] 11 HL Cas 523 ***(refd)***

Lewis v. Daily Telegraph Ltd, Lewis v. Associated Newspapers Ltd [1963] 2 All ER 151 ***(refd)***

Linotype Co Ltd v. British Empire Type-Setting Machine Co Ltd [1899] 81 LT 331 ***(refd)***

Lyan v. Lipton [1914] 49 L Jo 542 ***(refd)***

Magnolia Metal Co v. Tandem Smelting Syndicate Ltd [1900] 17 RPC 477 ***(refd)***
Martin v. Price [1894] I Ch 276 ***(refd)***
Metropolitan Saloon Omnibus Co Ltd v. Hawkins [1859] 4 H & N 87 ***(refd)***
Quartz Hill Consolidated Gold Mining Co v. Beall [1882] 20 Ch D 501 ***(refd)***
Potts v. Levy [1854] 2 Drew 272 ***(refd)***
Pride of Derby and Derbyshire Angling Associatio Ltd v. British Celanese Ltd [1953] I Ch 149 ***(refd)***
Rubber Improvement Ltd v. Daily Telegraph Ltd, Rubber Improvement Ltd v. Associated Newspapers Ltd [1964] AC 234 ***(refd)***
Singer Manufacturing Co v. Loog [1880] 18 Ch D 395 ***(refd)***
South Hetton Coal Co Ltd v. North-Eastern News Association Ltd [1894] 1 QB 133 ***(refd)***
Slazengers Ltd v. C Gibbs & Co [1916] 33 TLR 35 ***(refd)***
Spalding & Bros v. AW Gamage Ltd [1915] 84 LJ Ch 449 ***(refd)***
Spottiswoode v. Clark [1846] 2 Ch 154 ***(refd)***
Standard Chartered Bank v. Mukah Singh [1996] 3 MLJ 240 HC ***(refd)***
Takenaka (United Kingdom) Ltd & Anor v. Frankl unreported QB Alliot J 11 October 2000 upheld on appeal [2001] EWCA CIV 348 ***(refd)***
The New Straits Times Press (M) Bhd v. Airasia Bhd [1987] 1 MLJ 36 ***(refd)***
United States v. Smith 918 F 2d 1501 ***(refd)***
USA v. Siddiqui (US 11th Circuit Court of Appeals No 98-6994) ***(refd)***
Williams v. Beaumont [1833] 10 Bing 260 ***(refd)***
Wood v. Conway Corpn [1914] 2 Ch 47 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 90A, 90B
Petroleum Development Act 1974, ss. 3(1), 62

Federal Rules of Evidence [USA], s. 901(a), (b)(4)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 28, para 1, p 3
Rahul Matthan, *The Law Relating to Computer and the Internet*, Butterworth India New Delhi, pp 57-59

For the plaintiff - Tai Foong Lam; M/s Lee Hishammuddin
For the defendant - Ravin Vello (Lee Khai); M/s Tan Beng Hong

Reported by Gan Peng Chiang

JUDGMENT

Su Geok Yiam JC:

This is an application *vide* a summons in chambers (encl. 3) by the plaintiffs for *inter partes* interlocutory injunctions to restrain the defendant and his agents from doing certain acts in relation to any domain name which contains the word "PETRONAS" and to compel the defendant to transfer the domain name petronasgas.com to the plaintiffs.

It was filed on 7 December 2001 together with a certificate of urgency (encl. (4)). It is supported by the plaintiffs' affidavit affirmed by Zainalabidin bin Ismail, the General Manager (Legal) of the first plaintiff's Corporate and Technology division on 6 December 2001 (encl. (2)).

Facts And Background

The facts and backgrounds of the case are as follows:

The first plaintiff is Malaysia's well-known national petroleum corporation. It is a fully integrated oil and gas entity engaged in a broad spectrum of petroleum and related value adding business activities ranging from upstream exploration and production of oil and gas to downstream oil refining; marketing and distribution of petroleum products; the operation and management of petrol service stations and the sale of lubricants; trading of oil and gas products; gas processing and liquefaction; gas transmission pipeline network operation; marketing of liquefied natural gas processing and liquefaction; gas transmission pipeline network operation; marketing of liquefied natural gas and liquefied petroleum gas; petrochemical manufacturing and marketing; and shipping.

The first plaintiff was incorporated on 17 August 1974 under the Companies Act 1965. Pursuant to the Petroleum Development Act 1974 ("PDA") it is statutorily vested with the administration and stewardship of the entire oil and gas resources in Malaysia. Section 3(1) of the PDA also statutorily confers on the first plaintiff the acronym "PETRONAS". The first plaintiff holds a position of high standing amongst the Malaysian public.

The second and third plaintiffs are public listed companies on the Main Board of the Kuala Lumpur Stock Exchange.

The second plaintiff is one of the marketing arms of the first plaintiff and interfaces with the end users and customers of PETRONAS products. It is responsible for the sale of PETRONAS products such as motor gasoline, diesel, lubricant, aviation and bunker fuel, liquefied petroleum gas (LPG)

and kerosene to the general public in Malaysia. It operates an extensive network of more than 500 service stations in Malaysia under the trade name "PETRONAS" in both urban and rural areas. Apart from selling gasoline and petroleum products these stations also sell car care products and other goods and services to motorists and other classes of consumers in Malaysia. Eighteen of these PETRONAS service stations are also equipped with facilities for the dispensation of natural gas for vehicles (NGV).

The second plaintiff also operates plants for the bottling of liquefied petroleum gas (LPG) into metal cylinders for household and industrial use. These LPG filled metal cylinders are marketed under the trade name "PETRONAS" and bear the words "GAS PETRONAS" on each cylinder. These cylinders provide a source of cooking gas and are widely used in homes, restaurants, shops and stalls throughout Malaysia. Due to the long and extensive use of the trade mark "PETRONAS" at service stations dispensing gasoline to motorists in villages, towns, cities and all along the main highways linking the north and south of Peninsular Malaysia and the sale of PETRONAS cooking gas in metal cylinders to millions of households and other premises throughout Malaysia, the Malaysian public has come to associate the name "PETRONAS" in respect of gasoline and gas with the second plaintiff.

The third plaintiff is one of the pioneers of the Malaysian gas industry. It is in the business of processing and transmitting natural gas. It conducts its gas business under the trade name "PETRONAS GAS". Due to the long and extensive use of the trade mark "PETRONAS GAS" in connection with the supply of gas to industrial consumers, the third plaintiff has acquired very substantial goodwill and reputation amongst the relevant trade and public and is well known by its trade name "PETRONAS GAS". It has been supplying gas to the various industrial consumers since 1984 and has expanded its operations across the whole of Peninsular Malaysia and into Singapore through a network of trans-peninsular pipelines and gas processing plants.

The Plaintiffs' Case

As a result of the above the first, second and third plaintiffs have acquired substantial goodwill and reputation in the name "PETRONAS" both locally, among the general public and the relevant trading fraternity, and also internationally. The name "PETRONAS" is distinctive of them and/or their products and services owing to long and extensive use of the name "PETRONAS" in connection with all their commercial activities for almost three decades.

The defendant is an individual carrying out trading operations as a registered sole proprietor under the trade/business name "Araneum Consulting Services". He has his residential address at No. 283, Jalan New Village, Gersik, Muar 84700 Johor Darul Takzim and his business address at 3-11-12 Desa Bistari 2, Lintang Pantai Jerjak, Gelugor, Pulau Pinang, 11700 Penang. He is in no way associated with the plaintifffs.

Sometime in the year 2001, the plaintiff made a series of searches of domain names in the internet using the search engine better-whois.com and discovered that the defendant has registered the following domain names:

(1) "petronas-dagangan.com";

(2) "petronasgas.com";

(3) "mypetronasdagangan.com"and

(4) "mypetronas.com"

("the said domain names")

which contain the word "PETRONAS" for purposes of sale as shown by the defendant having chosen the name ARANEUM@EMAIL.COM DOMAIN FOR SALES in order to register the said domain names.

The defendant has also maintained a website under the name "www.petronasgas.com" ("the website") which purports to provide information on the locality of the plaintiffs' service stations and the plaintiffs' three phase Peninsular Gas Utilisation (PGU) Project. A printout of the main webpage of the website as at 20 November 2001 shows that the website is maintained by the defendant and is called Search Malaysia. The website is also accessible *via* URL HTTP://www.searchmalaysia.com". On the website the domain name "petronasgas.com" is described as a subsidiary of "searchmalaysia. com".

In so doing, the defendant has misrepresented to the relevant trade and public that the websites operated by the defendant under or linked to domain names incorporating the name "PETRONAS" are maintained or authorised by and/or connected to the plaintiffs, that the defendant and his business are connected to or associated with the plaintiffs and/or that the products and the services of the defendant are connected to or associated with the products and services of the plaintiffs or alternatively originate from or are those of the plaintiffs, resulting in confusion and deception amongst the relevant trade and public and the plaintiffs have suffered damage as a consequence.

Furthermore, in response to a request dated 16 November 2001 from the first plaintiff to the defendant to transfer to the first plaintiff the registration of the said domain names incorporating the name "PETRONAS" registered by the defendant on the ground that "PETRONAS" is the first plaintiffs trade name worldwide and the name "PETRONAS" is actually the shortened version for "PETROLEUM NASIONAL BERHAD" and the intellectual property rights in the trade-name belong to the first plaintiff, the defendant published certain statements ("the impugned statements") which the plaintiffs aver clearly refer to the plaintiffs and are defamatory, given their ordinary and natural meaning. The plaintiffs also aver that the defendant must be restrained on an urgent basis from further passing off the name of the plaintiffs and further publishing or repeating the impugned statements on the internet or elsewhere in view of the irreparable harm suffered or likely to be suffered by the plaintiffs which could not be compensated in the form of damages.

On 6 December 2001, the plaintiffs filed a writ of summons and statement of claim (encl. (1)) against the defendant seeking permanent injunctions against the defendant and damages for passing-off and defamation.

Ex Parte Injunctions

On 11 December 2001, Md. Raus bin Sharif, J granted to the plaintiffs the *ex parte* injunctions sought by the plaintiffs in respect of paras. (1), (2) and (4) of the plaintiffs' application.

On 14 December 2001, a copy each of the writ of summons and statement of claim, the plaintiffs' application for *ex parte* injunctions and affidavit-in-support, the *ex parte* order and a covering letter were served personally on the defendant.

Plaintiffs' Application

In this application the plaintiffs are seeking the following reliefs on the grounds of passing off of domain names and defamation:

(1) an *inter partes* interim injunction to restrain the defendant from doing the following acts:

(a) passing off or attempting to pass off any website with a domain name comprising the word "PETRONAS" which is not related to a website connected with the plaintiffs;

(b) making any representation to any registrar of domain names that the defendant is connected or associated with the plaintiffs and/or the name "PETRONAS" and the goodwill subsisting therein; and

(c) registering or attempting to register on the internet any domain name containing the word "PETRONAS";

(2) an *inter partes* interim injunction to restrain the defendant from publishing or posting or disseminating the impugned statements;

(3) an *inter partes* interim mandatory injunction compelling the defendant to take the necessary steps to procure the transfer of the registration of the domain name "petronasgas.com" to the plaintiffs within 14 days of the date of the order of court and not to procure the transfer of the same to any third party; and

(4) costs in the cause.

The Defendant's Case

On 28 December 2001, the defendant filed his affidavit-in-reply.

The defendant expressly states that he is Khoo Nee Kiong and he resides at 283, Jalan New Village, Gersik, Muar, 84700 Johor Darul Takzim. The defendant does not deny that he is the sole proprietor of Araneum Consulting Services. However, he denies that he has a trading address at 3-11-12, Desa Bistari 2, Lintang Pantai Jerjak, Gelugor, Pulau Pinang, 11700 Penang, that he is the owner of the domain names "mypetronasdagangan.com" and "petronasdagangan.com", that he has set up the impugned web page and that he is in charge of the website. The plaintiffs have not succeeded in showing the connection between www.mypetronas.com. and searchmalaysia.com. The defendant states that the e-mail address is not his. He also denies sending the e-mail containing the offensive statements and receiving the plaintiffs' e-mail. The defendant further denies that he is a cyber squatter.

Although the defendant does not dispute that the first plaintiff is the owner of the local domain name "www.petronas.com.my" as it has been registered with MYNIC, a subsidiary of MIMOS Berhad, the defendant contends that the first plaintiff is not the holder of the registered trademark "PETRONAS" in America as the domain names "petronas.com" and "petronas.net" are registered with Network Solutions Inc, the accredited registrar with ICANN, which has its address at 4676, Admiralty Way, Suite 330, Marina del Ray, Suite CA 902926601 USA. This contention of the defendant is based on information obtained from a search conducted at the official website of

ICANN, namely, "www.icann.org." The defendant also contends that better-whois.com is not the accredited registrar for ICANN and the information supplied by it is on as "as is" basis and its accuracy is, therefore, not guaranteed.

Neither is it reliable. Concerning the e-mail, they could be created and sent by mischief makers. Additionally, as the e-mail were not accompanied by a digital signature their contents including the name of the sender could be altered during transmission and at anytime thereafter.

Plaintiffs' Affidavit-In-Reply

On 7 January 2002, the plaintiffs filed their affidavit-in-reply (encl. (10)) affirmed on 31 December 2001 by Zainalabidin bin Ismail to the defendant's affidavit-in-reply.

The plaintiffs assert that the defendant's denials that he owns the website www.petronasgas.com at URL://128.241.196.124/petronasgas/, that there is a connection between the website and www.search malaysia.com and that the website www.search malaysia.com is owned by him is not credible in view of the contents of the plaintiffs' affidavit-in-support.

Furthermore, the webpage "about us" printed out from the website www.searchmalaysia.com state that the website is the initiative of Araneum Consulting Services Sdn. Bhd. and that it was launched on 1 April 2000. The mailing address is also stated, namely, Araneum Consulting Services, 3-11-12, Desa Bistari 2, Lintang Pantai Jerjak, Gelugor 11700, Penang. It also states that the website can be reached at its e-mail address of searchmalaysia@yahoo.com.

Subsequently, however, these webpages have been changed. Prior to the change, the plaintiffs had made a search on the website using the search engine "Wayback Machine" on an internet archive known as "Internet Archive".

In conclusion, the plaintiffs prayed for order in terms of their application for the *inter partes* injunctions on the ground that in view of the evidence adduced by the plaintiffs and exhibited in the plaintiffs' affidavit-in-support, the defendant's denials are bare denials.

Interim Consent Order

On 2 January 2002, Mohd Noor bin Hj. Abdullah J recorded an interim consent order for the interim injunctions to continue pending the disposal of the plaintiffs' application on an *inter partes* basis.

Decision Of The Court

On 26 February 2003, having considered the plaintiffs' application in the light of the submissions of and authorities cited by both the learned counsels I granted order in terms of paras. (1) and (2) of the plaintiff's application for prohibitory orders with costs in the cause ("the said order"). I made no order in respect of para. (3) of the plaintiffs application for a mandatory injunction as events had overtaken the plaintiffs' application. The events are that since the filing of the application by the plaintiffs in the instant case, the plaintiffs had filed a complaint with WIPO on 26 July 2002 concerning the dispute regarding the domain name "petronasgas.com" and in September/October 2002 WIPO decided that the domain name be transferred to the first plaintiff. Therefore, para. (3) of the plaintiffs' application for a mandatory order for the transfer to the defendant of the domain name "petronasgas.com" had ceased to be relevant.

Issues

In making the said order, I had to consider the following issues which had arisen for the determination of the court:

(1) whether the identity of the sender of the e-mail, the author of the webpage and the operator of the website has been sufficiently established;

(2) whether it is mandatory for the plaintiffs to exhibit a certificate pursuant to s. 90A of the Evidence Act 1950 in respect of the computer printouts containing the impugned statements;

(3) whether the impugned statements are manifestly defamatory and if so, whether an interlocutory injunction should be granted to restrain their further publication by the defendant; and

(4) whether the impugned statements constitute passing off and if so, whether an interlocutory injunction should be granted to restrain further passing off by the defendant.

The Internet And Domain Name

Before giving the reasons why I made the said order I shall reproduce below the following description of the internet by Rahul Matthan in his book on *"The Law Relating to Computer and the Internet"* published in 2000 by Butterworth India New Delhi, at pp. 57 to 59:

The internet is a giant network of individual computers which are interconnected through a complicated structure of servers and designed to withstand a nuclear attack. From its inception, the network was designed to be a decentralised, self-maintaining series of links between computers and computer networks, capable of rapidly transmitting communications without any direct human involvement or control. Further, the system was specifically designed to automatically re-route communications, if one or more individual links were damaged or unavailable. Thus, the system of linked computers was designed to allow vital research and communications to continue, even if some portions of the network were damaged as a result of enemy aggression or war.

To achieve this type of resilience in the communication medium, the creation of multiple links to and from each computer (or computer network) on the network was encouraged. Thus, a computer located in one location, may be linked through dedicated telephone lines to other computers in other locations. Each of those computers could in turn be linked to other computers, which themselves would be linked to several other computers. Thus, a communication sent over the network could travel over any one of a number of routes to its destination. If the network finds that the message cannot for any reason, travel along a particular path (because of military attack, technical glitch, or any other reason), the network is configured to automatically re-route the message through a different feasible route. This type of transmission and re-routing, would normally occur in a matter of seconds.

As a result of this type of structure, the fact of the matter is that no single entity is responsible or even capable of managing or regulating the internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks, independently decided to use common data transfer protocols, to exchange communications and information with other computers (which in turn exchange communications and information with still more computers). There is no centralised storage location, control point, or communication channel for the internet, and it would not be technically feasible for a single entity to control all the information conveyed on the internet.

It is also pertinent to note that there is relatively no regulation as to the type of persons who are permitted to access the internet. Thus, internet access is normally freely available to students and members of educational institutions, while there are a host of commercial internet service providers who allow subscribers to access the internet for a fee. In India, the Videsh Sanchar Nigam Limited and various private Internet Service Providers provide Internet access through a number of schemes and without any restriction on the nature of persons permitted to avail of the service.

> Once an individual has access to the internet, he/she can use a variety of services such as FTP (File Transfer Protocol), Telnet, email and the World Wide Web to receive and transfer information. Given the nature of the internet, none of these activities regarding the posting or receipt of information can be successfully regulated. Thus, anyone of the users of the internet can post information on the internet which could, theoretically, be accessible by every single person logging on to the internet, without any government or other entity being in a position to prevent him/her from doing so.

I also reproduce below the following excerpt from the judgment of Aldous LJ in *British Telecommunications plc and Another v. One In A Million Ltd, and Ors and Other Actions* [1998] 4 All ER 476 at pp. 480 and 481 which explains in very simple terms what is the internet and which also adopts the explanation by the learned trial judge, Jonathan Sumption, QC sitting as a deputy judge of the High Court on what is a domain name:

> At its simplest the Internet is a collection of computers which are connected through the telephone network to communicate with each other. As explained by the Judge ([1998] FSR 265 at 267):
>
> > The internet is increasingly used by commercial organisations to promote themselves and their products and in some cases to buy and sell. For these purposes they need a domain name identifying the computer which they are using. A domain name comprises groups of alphanumeric characters separated by dots. A first group commonly comprises the name of the enterprise or a brand name or trading name associated with it, followed by a "top level" name identifying the nature and sometimes the location of the organisation. Marks marks-and-spencer.co.uk, marks-and-spencer.com and stimichael.com. The domain name marks-and-spencer.co.uk, for example, will enable them to have an e-mail address in the form johnsmith@marks-and-spencer.co. uk and a web site address in the form http://www.marks-and-spencer.co.uk. The top level suffix co.uk indicates a United Kingdom company. Other top level names bear conventional meanings as follows:
> >
> > – com International commercial organisations
> >
> > – edu Educational organisation
> >
> > – gov Government organiation
> >
> > – org Miscellaneous organisations

> There is an argument, which does not matter, about whether this last designation is confined to non-profit-making organisations. There is no central authority regulating the internet, which is almost entirely governed by convention. But registration services in respect of domain names are provided by a number of organisations. Network Solutions Inc of Virginia in the United States is the organisation generally recognised as responsible for allocating domain names with the top level suffixes "com" and "edu". In the United Kingdom a company called Nominet UK provides a registration service in respect of domain names ending with the geographical suffix uk preceded by functional suffixes such as co, org. gov or edu.

Nominet UK applied to intervene in this appeal. It is a 'not for profit' limited company, which is registered with the Internet Assigned Numbers Authority. It operates what is known as the Register Database, which contains the domain names and IP addresses for .co.uk, .net.uk, .ltd.uk and plc.uk and full details of the registrant of the domain name and its registration agent. It charges a fee for its service. From time to time (eg every two hours or so) the information on the database is extracted to a number of domain name servers. Domain name servers are computers which hold the index of names which map to particular numbers used in intercomputer transactions. For example, if I wanted to contact Marks & Spencer plc, I can use the domain name marks-and spencer.co.uk. The domain name server will recognise the domain name and provide the appropriate sequence of numbers, called the IP address. It is that address which identifies the computer owned by Marks & Spencer plc, thereby enabling my computer to contact that owned by Marks & Spencer plc.

As part of its service Nominet offers a 'Whois' service to the public. Thus the public can type in a domain name on Nominet's website and press the appropriate button to execute the 'Whois' search. The answer sets out the recorded information on the organisation or person who has registered the domain name. This is useful if, for example, a person wishes to contact the owner of a domain name.

Members of the public would not ordinarily have a domain name. They would subscribe to a service provider and have an e-mail address. That enables a subscriber to send a message to another computer through the service provider, which forwards the message when requested to the appropriate computer. The subscriber can also browse around the world wide web and seek web pages associated with a particular domain name. Thus if he transmits a domain name to his service provider, it will contact the domain name and the web pages sought and provide the information obtained.

Web sites are used for many activities such as advertising, selling, requesting information, criticism and the promotion of hobbies.

(1) Identifying The Defendant

The defendant has relied on the case of *Takenaka (United Kingdom) Ltd, and Another v. Frankl unreported, QB, Alliot J 11 October 2000 upheld on appeal* [2001] EWCA CIV 348 to support his contention that the plaintiffs here should have obtained disclosure orders in the nature of a Norwich Pharmacal order against various internet service providers to ascertain the identity of the sender of the e-mail before suing the defendant as the defendant has denied that he is the sender of the e-mail or that he is in any way connected with the website and webpage containing the impugned statements.

In that case the defendant steadfastly denied that he was the author of the defamatory e-mail in question. In the course of identifying the defendant to enable it to commence proceedings the claimants obtained disclosure orders against various internet service providers. Nevertheless, the decision in that case does not favour the defendant here because in that case although the court also appointed an expert who conducted a detailed forensic examination of the computer, ultimately the expert delivered an opinion that the e-mail had been sent by the defendant. The court accepted his opinion and liability was established against the defendant in that case.

In my judgment, the plaintiffs have shown that the name in the e-mail address is that of the defendant, that the defendant is the sole proprietor of Araneum Consulting Services and that both the websites are operated by Araneum Consulting Services. From the search conducted by the plaintiffs on the Registrar of Businesses, the business of Araneum Consulting Services is that of "Management consultant, commission agent, internet home page design consultant, quality, productivity and manufacturing consultant".

It follows that the defendant is not a stranger to the internet, nor the webpages and websites in the internet. More importantly, using the search engine Better-whois.com which is a more reliable search engine than its predecessor Whois.com the search conducted by the plaintiffs on the domain name "petronasgas.com" clearly shows as follows:

Registrant:
Araneum Consulting Services
283
Jalan
Gelugor, Penang 11700
MY

Registrar: Dotster (http://www.doster.com)
Domain Name: PETRONASGAS.COM
Created on: 06-NOV-01
Expires on: 06-NOV-02
Last Updated on: 06-NOV-01

Administrative Contact:
Khoo, nk Khoo @ searchmalaysia.com
Araneum Consulting Services
3-11-12 Desa Bistari 2,
Lintang Pantai Jerjak,
Gelugor, Penang 11700
MY
6017-4772401

Technical Contact:
khoo,nk khoo@searchmalaysia.com
Araneum Consulting Services
3-11-12 Desa Bistari 2
Lintang Pantai Jerjak,
Gelugor, Penang 11700
MY
6017-4772401.

A similar search conducted on the domain name "mypetronas.com" clearly shows as follows:

Registrant:
NKKHOO (MYPETRONAS2-DOM)
3-11-12, DESA BISTARI 2,
LINTANG PANTAI JERJAK,
GELUGOR, PENANG
PG 11700
MY
MY

Domain Name: PETRONASGAS.COM

a Administrative Contact, Billing Contact:
Webmaster, ACS NEE (KNK5) araneum@
EMAIL. COM
ARANEUM CONSULTING SERVICES
3-11-12 Desa Bistari II,
Lintang Pantai
b Jerjak,
Gelugor,
Penang
11700
MY
c +604-6552401 8108215318.

Another similar search conducted on the domain name "petronas-dagangan.com" clearly shows as follows:

Registrant:
d ARANEUM@EMAIL.COM DOMAIN FOR SALES
(PETRONAS-DAGANGAN-COM)
3-11-12, DESA BISTARI II,
LINTANG PANTAI JERJAK,
GELUGOR, PENANG
PG 11700
e MY

Domain Name: PETRONASDAGANGAN.COM

Administrative Contact, Billing Contact:
Webmaster, ACS NEE (KNK5) araneum@
f EMAIL. COM
ARANEUM CONSULTING SERVICES
3-11-12 Desa Bistari II,
Lintang Pantai Jerjak,
Gelugor,
Penang
g 11700
MY
+604-6552401 8108215318.

A further similar search conducted on the domain name "mypetronasdagangan.com." clearly shows as follows:

h

i

Registrant:
ARANEUM@EMAIL.COM DOMAIN FOR SALES
(MYPETRONASDAGANGAN-COM)
3-11-12, DESA BISTARI II,
LINTANG PANTAI JERJAK,
GELUGOR,
PENANG
PG 11700
MY

Domain Name: MYPETRONASDAGANGAN.COM

Administrative Contact, Billing Contact:
Webmaster, ACS NEE (KNK5) araneum@
EMAIL. COM
ARANEUM CONSULTING SERVICES
3-11-12 Desa Bistari II,
Lintang Pantai Jerjak,
Gelugor,
Penang
11700
MY
+604-6552401 8108215318.

As some of the domain names containing the word "PETRONAS" are juxtaposed with vulgar and obscene words as set out and repeated in the impugned statements one would have thought that upon these been brought to the knowledge of the defendant he would have taken immediate steps towards establishing the true identity of the sender if it was not himself and to lodge a police report in order to protect himself and the goodwill of his business.

The offensive e-mail also carried the handphone number of the defendant. In a case like the present the defendant cannot just merely sit back and deny that he did send the offensive e-mail and state that the e-mail address of his company Araneum Consulting Service is sales@araneum.com.my. As a reasonable person who is in the business of providing quality and internet consultancy services he is expected to do more than that. His reply dated 4 December 2001 to the plaintiffs' letter of 26 November 2001 expresses no shock at its contents. On the contrary the defendant, although stating that he found the first plaintiff's letter too disturbing to his business activities, merely says, *inter alia*, as follows:

> Araneum Consulting Services has no authorised person to communicate with your client prior to 28 November 2001. Therefore we would like to categorically deny our company had sent out emails or posted any electronic messages to your client/ICANN/Soc.Culture. Malaysia/Internet/ other medias.
>
> We deem your statements in the letter as baseless accusations without being supported by any concrete evidence. For your reference, our company website, www.araneum.com.my has never published any defamatory statements against anyone. Besides that, we did not use email to communicate with our clients or outsiders or business or legal matters for the security reason since one year ago.

In his second reply dated 4 December 2001, the defendant has acknowledged receiving "one unregistered letter (TFL/SAM/22347/01) dated 26 November 2001 from Lee Hishamuddin on 4 December 2001 addressed to 3-11-12, Desa Bistari 2, Lintang Pantai Jerjak, Gelugor 11700 Penang".

The court also notes that the defendant's first reply dated 28 November 2001 is a response to the first plaintiffs first letter dated 16 November 2001. It is addressed as follows:

> Corporate Services & Technology
> Legal & Corporate Affairs Division
> Level 68, Tower 1,
> Petronas Twin Tower,
> 50088 Kuala Lumpur
> Attn: Encik Zainalabidin Ismail

Although the defendant has disputed in encl. (9) that he has a business address at "3-11-12 Desa Bistari 2, Lintang Pantai Jerjak, Gelugor 117009 Penang" ("the said address") yet it was indeed strange that he was able to receive the first plaintiff's first letter dated 16 November 2001 which according to the plaintiffs was sent to the defendant at the said address and which according to the defendant he had collected at the "Ibu Pejabat Pos Georgetown" on 26 November 2001. He has not explained how this could have happened. He has also not explained how he was able to receive the first plaintiffs second letter dated 26 November 2001 which was also addressed to the said address since he has stated in his first affidavit-in-reply that the business address of Araneum Consulting Services is 283, Jalan New Village, Gersik 84700 Muar, Johor.

In his second reply dated 4 December 2001 the defendant has stated that the number 04-6552401 (which bears the area telephone code for Penang) is a home phone number and is entirely used for his personal matters. Yet he has sworn in his affidavit-in-reply (encl. (9)) that his address is 283, Jalan New Village, Gersik, Muar 84700 Johor Darul Takzim (which has a different area telephone code).

Furthermore, he does not even request for a copy of the e-mail and webpage with a view to tracing and ascertaining who could have sent the e-mail and designed the webpage if in fact he had no hand in it. The court finds his response grossly indifferent and unreasonable.

In the circumstances of this case I am more than satisfied that it was most probably the defendant who had sent the e-mail and who had set up the webpage and it follows, therefore, that the plaintiffs have sufficiently identified the defendant for the purposes of the injunctive relief sought by the plaintiffs in this application.

(2) Section 90A of Evidence Act 1950

Whether it is mandatory for the plaintiffs to exhibit a certificate pursuant to s. 90A of the Evidence Act 1950 in respect of the computer printouts containing the impugned statements in its affidavit-in-support of their application for the interim injunctions?

Explanation 3 to s. 62 of the Evidence Act 1950 renders a document produced by a computer primary evidence.

Section 90A of the Evidence Act 1950 provides for the admissibility of documents produced by a computer. It reads as follows:

Documents Produced by a Computer

(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

(3) (a) ...

(b) ...

(4) ....

(5) ...

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

(7) ...

In my judgment, the above issue should be decided in the negative. The reason is that the plaintiffs need only show a *bona fide* serious question to be tried at this stage of the proceedings and there is no necessity for the plaintiffs to show a *prima facie* case. The deponent of the plaintiffs' affidavit-in-support, Zainalabidin bin Ismail, has deposed that the contents of the affidavit are within his personal knowledge unless otherwise stated. The defendant has not challenged nor disputed this assertion of Zainalabidin bin Ismail in the defendant's affidavit-in-reply. Therefore, in my view there is no necessity for the plaintiffs to exhibit a s. 90A certificate in his affidavit-in-support of the plaintiffs' application in respect of the computer printouts containing the impugned statements. The reason is because the plaintiffs need only tender the s. 90A certificate if the plaintiffs do not wish to call the officer who has personal knowledge as to the production of the computer printouts by the computer to testify to that effect in the trial proper. (See the cases of *Gnanasegaran a/l Panarajasingam v. Public Prosecutor* [1997] 4 CLJ 6 and *Standard Chartered Bank v. Mukah Singh* [1996] 3 MLJ 240).

Section 90B of the Evidence Act 1950 deals with the weight to be given to a document produced by a computer admitted by the court pursuant to s. 90A of the Evidence Act. It provides as follows:

90B. In estimating the weight, if any, to be attached to a document, or a statement contained in a document, admitted by virtue of section 90A, the court:

(a) may draw any reasonable inference from circumstances relating to the document or the statement, including the manner and purpose of its creation, or its accuracy or otherwise;

(b) shall have regard to:

(i) the interval of time between the occurrence or existence of the facts stated in the document or statement, and the supply of the relevant information or matter into the computer; and

(ii) whether or not the person who supplies, or any person concerned with the supply of, such information or the custody of the document, or the document containing the statement, had any incentive to conceal or misrepresent all or any of the facts stated in the document or statement.

The American case of *USA v. Siddiqui,* U.S 11th Circuit Court of Appeals No. 98-6994 which was cited by Mr. Ravin Veloo, the learned defence counsel, is illuminating. In that case one Siddiqui had challenged the district court's admission into evidence of e-mail on the ground of the government's failure to show with reliability who sent the e-mail. He claimed that the district court abused its discretion by allowing the government to offer the e-mail into evidence without proper authentication. The Court of Appeals applied s. 901(a) and s. 901(b)(4) of the Federal Rules of Evidence which provides several general methods of authentication and held that a number of factors supported the authenticity of the e-mail.

Section 901(a) of the Federal Rules of Evidence provides that documents must be properly authenticated as a condition precedent to their admissibility "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Section 901(b)(4) of the Federal Rules of Evidence further provides that a document may be authenticated by "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

It was held in another American case, *United States v. Smith* 918 F. 2d 1501, 1510 that the "government may authenticate a document solely through the use of circumstantial evidence including the document's own distinctive characteristics and the circumstances surrounding its discovery."

Similarly here, in my judgment, the plaintiffs can rely on circumstantial evidence to show that the defendant is the author and sender of the impugned statements contained in the e-mail and web page as the provisions of the Evidence Act 1950 in particular s. 62, s. 90A, s. 90B, and s. 3

which defines "document" to include, *inter alia*, any electronic ... data whatsoever can be utilised for this purpose although there is no specific reference to e-mail or webpage or website.

(3) Defamation

In English Law, speaking generally, every man is entitled to his good name and to the esteem in which he is held by others and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse. (See *Halsbury's Laws of England*, 4th edn, vol 28, para. 1, p. 3).

A corporate body may maintain an action for defamation in the same way as an individual. (See *Metropolitan Saloon Omnibus Co. Ltd v. Hawkins* [1859] 4 H & N 87 at 90, per Pollock CB; approved in *South Hetton Coal Co Ltd v. North-Eastern News Association Ltd* [1894] 1 QB 133 at 142, CA. See also *Williams v. Beaumont* [1833] 10 Bing 260). However, the imputation must reflect upon the company or corporation itself and not upon its members or officials only. (See *South Hetton Coal Co. Ltd v. North-Eastern News Association Ltd* [1894] 1 QB 133 at 141, CA, per Lord Esher MR).

A trading company or corporation has a trading reputation and can maintain an action for libel or slander in respect of a statement that injures its trade or business. (See *South Hetton Coal Co Ltd v. North-Eastern News Association Ltd* [1894] 1 QB 133, CA (libel); *D. and L. Caterers Ltd and Jackson v. D'Aiou* [1945] KB 364, [1945] 1 All ER 563, CA (slander); *Linotype Co Ltd v. British Empire Type-Setting Machine Co Ltd* [1899] 81 LT 331, HL; *Slazengers Ltd v. C. Gibbs & Co* [1916] 33 TLR 35; and *Lyan v. Lipton* [1914] 49 L Jo 542). The company is not required to prove that it has suffered special damage, such as financial loss. (See *Company of Proprietors of Selby Bridge Ltd v. Sunday Telegraph Ltd* [1966] 197 Estates Gazette 1077). It may recover damages for the injury to its goodwill. (See *Rubber Improvement Ltd v. Daily Telegraph Ltd, Rubber Improvement Ltd v. Associated Newspapers Ltd* [1964] AC 234 at 262; *sub nom. Lewis v. Daily Telegraph Ltd, Lewis v. Associated Newspapers Ltd* [1963] 2 All ER 151 at 156, HL, per Lord Reid; see also *South Hetton Coal Co. Ltd v. North-Eastern News Association Ltd* [1894] 1 QB 133 at 143, CA, per Lopes CJ).

The general rule is that to entitle a plaintiff to an interlocutory injunction he must satisfy the court that his claim is not frivolous or vexatious and that there is a serious question to be tried. (See *American Cyanamid v. Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL; *Keet Gerald*

Francis Noel John v. Mohd Noor (a), *Harun Abdullah & 2 Ors* [1995] 1 CLJ 293; and *Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461).

However different principles apply to the grant of an interlocutory injunction in defamation cases because of the right of free speech although the court has jurisdiction to restrain the publication of defamatory statements, if necessary, on an interlocutory application. (See *Quartz Hill Consolidated Gold Mining Co. v. Beall* [1882] 20 Ch D 501, CA).

An interlocutory injunction will not be granted in defamation cases when the defendant swears that he will be able to justify the libel and the court is not satisfied that he may not be able to do so. (*Bonnard v. Ferryman* [1891] 2 Ch 269, CA).

In Malaysia, in the case of *The New Straits Times Press (M) Bhd. v. Airasia Bhd.* [1987] 1 MLJ 36, at p. 38, Abdul Hamid Ag LP (now LP (rtd)) in delivering the judgment of the Federal Court and having stated succinctly the law regarding the grant of interlocutory injunctions in defamation cases in the following terms:

> There is, in law, no doubt that "the High Court may grant an interlocutory injunction restraining the defendant, whether by himself or by his servants or agents or otherwise, from publishing or further publishing matter which is defamatory or of malicious falsehood. It is not necessary to show that there has already been an actionable publication or that damage has been sustained. In appropriate cases an injunction may be granted *ex parte* and before the issue of a writ. (*Halsbury's Laws of England,* 4th edn, Vol. 28, para 166).

nevertheless proceeded to express the following caution:

> However, in deciding whether or not to grant an interlocutory injunction the Court must exercise its discretion judicially. It is of cardinal importance to bear in mind that:
>
> > Because of the court's reluctance to fetter free speech and because the questions that arise during the proceedings, such as whether the meaning is defamatory, whether justification or fair comment are applicable and as to malice, are generally for the jury, interlocutory injunctions are granted less readily in defamation proceedings than in other matters and according to different principles. *Halsbury's Law of England,* 4th Edition, Vol. 28, para 167. (see *Quartz Hill Consolidated Gold Mining v. Beall* [1882] 20 Ch. D 501).

In *Bonnard v. Ferryman*, Lord Coleridge CJ delivering the judgment of the Court in which Lord Esher MR, and Lindley, Bowen and Lopes LJJ concurred, emphasised that:

> The right of free speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of Lord Esher, M.R. in *Coulson v. Coulson* – "To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable.

His Lordship also said as follows:

> Authorities do also show that the principle that there shall be no interim injunction if defence is raised "applies not only to the defence of justification" (*Bonnard v. Ferryman*), "but also to the defence of privilege" (*Quartz Hill Consolidated Gold Mining v. Beall*), and "fair comment" (*Fraser v. Evans & Ors.*). In accordance with the long established practice in defamation action, the principles enunciated by the House of Lords in *American Cyanamid v. Ethicon Ltd.* relating to interim injunctions are not applicable in action for defamation. *(Herbage v. Pressdram Ltd.)*.

In my judgment the impugned statements in the instant case are manifestly defamatory as the following conditions have been satisfied. First, the natural and ordinary meaning of the impugned statements which also includes their inferential meaning is, *inter alia*, as follows:

(1) that the plaintiffs do not have any lawful claim to any domain name containing the word "PETRONAS";

(2) that the plaintiffs are in the habit of resorting to strong-arm tactics to oppress and intimidate other local companies and/or local business entities;

(3) that the plaintiffs are attempting or have in the past attempted to extort money from local companies or business entities by forcing them to transfer domain names to the plaintiffs for free;

(4) that the plaintiffs consistently behave in an arrogant or high-handed fashion to oppress and intimidate other local companies and/or local entities;

(5) that the plaintiffs have acted like a 'robber' and their actions may be likened to a form of theft; and

(6) the legal services department of the plaintiffs is generally incompetent and/or ignorant.

Secondly, the plaintiffs have shown that the impugned statements were:

(1) calculated to injure the reputation of the plaintiffs by exposing them to hatred, contempt or ridicule;

(2) intended to lower the plaintiffs in the estimation of right-thinking members of society generally;

(3) calculated to injure and disparage the plaintiffs' reputation in the plaintiffs' office, profession and trade; and

(4) intended to bring the plaintiffs, by virtue of their standing, honour and integrity, into public scandal, odium and contempt.

Thirdly, the plaintiffs have sufficiently demonstrated that the impugned statements have been published to third parties as follows:

(1) the first ICANN e-mail;

(2) the second ICANN e-mail;

(3) the statements on the website;

(4) the first soc.culture.malaysia posting; and

(5) the second soc.culture.malaysia posting.

ICANN is the Internet Corporation for Assigned Names and Numbers. It is an international organisation which dispenses the top level domain names. It was formed to assume responsibility for the Internet Protocol address spare allocation, protocol parameter assignment, domain name system management, and root server system management functions previously

performed under U.S. Government contract by other entities. The Board of Directors of ICANN comprises 9 persons. The staff of ICANN comprises 16 persons.

The statements on the website are accessible by every single internet user in the world accessing the URL http://www.petronasgas.com by directly keying in this URL or by keying in "PETRONAS" to an internet search engine.

Soc.culture.malaysia is a Usenet facility which enables authors to publish material to readers worldwide. Authors submit articles, known as postings, to the Usenet news server based at its local service provider which then disseminates the postings *via* the newsgroup. The postings may be placed on a newsgroup dealing with a certain subject, and may be ultimately distributed and stored on the news servers of all services providers that offer Usenet facilities.

The transmission of a defamatory posting from the storage of a new server is in effect a publication of that posting to any subscriber who accesses that newsgroup containing that posting.

In the instant case, there is a *bona fide* serious question to be tried that the soc.culture.com postings were e-mailed from the defendant's computer to the soc.culture.com Usenet facility. Subsequently, it may have been accessible to all subscribers of the particular newsgroup in which it was placed.

The defence is one of denial, ie, that the defendant did not send the impugned statements. The defendant is not relying on the defence of justification, privilege or fair comment on a matter of public interest.

Nevertheless, I am satisfied that the impugned statements clearly refer to the plaintiffs. It is also clear that the impugned statements are obviously untrue, are defamatory of the plaintiffs and were written with the sole intention of identifying and defaming the plaintiffs.

Fourthly, the plaintiffs have shown that by reason of the publication of the impugned statements, the plaintiffs have suffered grave injury to their trading personality and irreparable loss and damage and will continue to suffer such irreparable loss and damage.

The plaintiffs have also shown that the defendant has by publishing the impugned statements libeled the plaintiffs and there is reason for the court to believe that as a result of the repetition of the impugned statements by the defendant on numerous occasions and the defendant's threat of republication in its invitation to readers of the statements on the website to "spread this bully case worldwide" that publication or further publication of the impugned statements is threatened or intended and that if it takes place the plaintiffs will suffer immediate and irreparable injury and damage to the plaintiffs' trading reputation because the impugned statements could be further published to an unlimited number of internet users including local and foreign industry players and corporations. Therefore, an interlocutory injunction should be granted to restrain the defendant from further defaming the plaintiffs on the internet which is a borderless unrestricted environment or elsewhere.

Fifthly, the court is satisfied that there has been no improper delay on the part of the plaintiffs in bringing this application because the existence of the website www.petronasgas.com maintained by the defendant, purporting to be a "subsidiary of the searchmalaysia.com" and purporting to provide information on the locality of the plaintiffs' service stations and three-phase Peninsular Gas Utilisation (PGU) project and displaying the impugned statements was only discovered by the plaintiffs on or about the end of November 2001 and the defendant's official response to Messrs. Lee Hishammuddin's letter was only received on 5 December 2001.

Finally, the plaintiffs have given an undertaking as to damages. The court is satisfied that the plaintiffs are in a strong financial position to meet their undertaking in the event the defendant wins at the trial.

(4) Passing-off

In the instant case the plaintiffs are seeking to protect their intellectual property in their trade mark and also in their internet domain names. The latter is a new form of intellectual property which came about because of the advent of the internet.

An action for passing off is a very old and familiar one. It is used to protect property by preventing damage to goodwill associated with the name or mark by preventing other people from fraudulently stating that it is their manufacture when it is not. In this way it is a remedy to protect the right of a man to have the reputation of selling that which is his manufacture as his manufacture. (See Lord Halsbury LC's judgment in *Magnolia Metal Co. v. Tandem Smelting Syndicate Ltd.* [1900] 17 RFC 477 at 484).

It is also a fundamental rule that no man has a right to pass off his goods for sale as the goods of a rival trader. (See *Leather Cloth Co. Ltd. v. American Leather Cloth Co. Ltd.* [1865] 11 HL Cas 523 at 538, per Lord Kingsdown.

It would seem that in passing-off cases the right invaded is the property in the business or goodwill likely to be injured by the misrepresentation. (See *Spalding & Bros v. A.W. Gamage Ltd* [1915] 84 LJ Ch 449, HL.)

The general rule is that if a plaintiff applies for an injunction in respect of a violation of a common law right, and the existence of that right, or the fact of its violation is denied, he must establish his right at law (See *Spottiswoode v. Clark* [1846] 2 Ch 154). Having done that he is, except in special circumstances, entitled to an injunction to prevent a recurrence of that violation. In certain cases the court may not require the plaintiff to establish his right at law, for instance where his title is not denied. (See Directors of Imperial Gas Light and *Coke Co v. Broadbent* [1859] 7 HL Cas 600 at 612; *Fullwood v. Fullwood* [1878] 9 Ch D 176; *Martin v. Price* [1894] 1 Ch 276 at 285, CA; *Wood v. Conway Corpn* [1914] 2 Ch 47, CA; *Pride of Derby and Derbyshire Angling Association Ltd v. British Celanese Ltd* [1953] I Ch 149 at 181, [1953] I All ER 179 at 197, CA and *Potts v. Levy* [1854] 2 Drew 272).

The principles upon which actions for passing off were founded are stated in the proposition that nobody has any right to represent his goods as the goods of somebody else. (See Lord Parker's judgment in *AG Spalding Bros v. AW Gamage Ltd* [1915] 84 LJ Ch 449 at 449. See also *Singer Manufacturing Co v. Loog* [1880] 18 Ch D 395 and *Frank Reddaway & Co. Ltd. v. George Banham & Co Ltd.* [1896] AC 1999, [1895-9] All ER Rep 133).

With regard to the basis of the cause of action of passing off and the property right which was damaged, Aldous LJ in delivering the first judgment in the case of *British Telecommunications plc and Another v. One In A Million Ltd. & Ors, and Other Actions* [1998] 4 All ER 476 with which Swinton Thomas and Stuart-Smith LJJ concurred cited the following excerpt from Lord Parker's judgment in *AG Spalding Bros v. AW Gamage Ltd* [1915] 84 LJ Ch 449 at 450:

The basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is where the representation is implied in the use or imitation of a mark, trade mark, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on. There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing-off actions. The more general opinion appears to be that the right is a right of property. This view naturally demands an answer to the question, Property in what? Some authorities say, property in the mark, name, or get-up improperly used by the defendant. Others say, property in the business or goodwill likely to be injured by the misrepresentation. Lord Herschell, in *Reddaway v. Banham & Co* [1896] AC 199, [1895-9] All ER Rep 133) expressly dissents from the former view, and if the right invaded is a right of property at all, there are, I think, strong reasons for preferring the latter view. In the first place, cases of misrepresentation by the use of a mark, name, or get-up infringed unless it be B's name; and if he says falsely, "These are B's goods of a particular quality," where the goods are in fact B's goods, there is no name which is infringed at all.

In *British Telecommunications plc and Another v. One In A Million Ltd & Ors and Other Actions* [1998] 4 All ER 476 the Court of Appeal in dismissing the defendants' appeal held that the court had jurisdiction to grant injunctive relief in a passing off action where a defendant was equipped with or was intending to equip another with an instrument of fraud.

The facts of the case were that the plaintiff, namely, British Telecommunications plc, Telecom Services Cellular Radio Ltd, Virgin Enterprises Ltd, J Sainsbury plc, Marks & Spencers plc and Ladbroke Group plc, respectively, in each of the five actions was a well-known company possessing registered trade marks, most of which incorporated the company's name and the use of which was such that the plaintiffs owned

substantial goodwill attaching to them. The defendants were dealers in internet domain names who registered names and sold them to potential users very much in the same way as company registration agents and it was accepted that in each case they had registered domain names comprising the name or trade mark of the plaintiff. The plaintiff sought injunctive relief, alleging passing off and infringement of their trade marks and applied for summary judgment. The judge granted the plaintiffs final injunctions *quia timet* holding that although mere registration of a deceptive company name or internet domain name was not passing off, it was sufficient for the purposes of granting the injunction that what was going on was calculated to infringe the plaintiff's rights in future as it was beyond dispute that the defendant's activities were calculated to infringe the plaintiffs' right in the future. The reason was because the only possible reason why anyone, who was not connected with one of the plaintiffs would wish to use a domain name incorporating their trade marks or names would be to pass himself off as part of a plaintiff's group or his products off as theirs.

In respect of the domain name containing the name Marks & Spencer which was registered by the defendant One In A Million Ltd Aldous LJ had this to say at pp. 497 and 498:

> It is accepted that the name Marks & Spencer denotes Marks & Spencer plc and nobody else.
>
> Thus anybody seeing or hearing the name realises that what is being referred to is the business of Marks & Spencer plc. It follows that registration by the appellants of a domain name including the name Marks & Spencer makes a false representation that they are associated or connected with Marks & Spencer pic. This can be demonstrated by considering the reaction of a person who taps into his computer the domain name marksandspencer.co.uk and presses a button to execute a 'whois' search. He will be told that the registrant is One In A Million Ltd. A substantial number of persons will conclude that One In A Million Ltd. must be connected or associated with Marks & Spencer plc. That amounts to a false representation which constitutes passing off.
>
> ... The placing on a register of a distinctive name such as marksandspencer makes a representation to persons who consult the register that the registrant is connected or associated with the name registered and thus the owner of the goodwill in the name. Such persons would not know of One In A Million Ltd. and would believe that they were connected or associated with the owner of the goodwill in the domain name they had registered.

Further, registration of the domain name including the words Marks & Spencer is an erosion of the exclusive goodwill in the name which damages or is likely to damage Marks & Spencer plc.

...

I also believe that domain names comprising the name Marks & Spencer are instruments of fraud. Any realistic use of them as domain names would result in passing off and there was ample evidence to justify the injunctive relief granted by the judge to prevent them being used for a fraudulent purpose and to prevent them being transferred to others.

...

...

...

I also believe that the names registered by the appellants were instruments of fraud and that injunctive relief was appropriate upon this basis as well. The trade names were well-known 'household names' denoting in ordinary usage the respective respondent. The appellants registered them without any distinguishing word because of the goodwill attaching to those names. It was the value of that goodwill, not the fact that they could perhaps be used in some way by a third party without deception, which caused them to register the names. The motive of the appellants was to use that goodwill and threaten to sell it to another who might use it for passing off to obtain money from the respondents. The value of the names lay in the threat that they would be used in a fraudulent way. The registrations were made with the purpose of appropriating the respondents' property, their goodwill, and with an intention of threatening dishonest use by them or another. The registrations were instruments of fraud and injunctive relief was appropriate just as much as it was in those cases where persons registered company names for a similar purpose.

Similarly here, in the instant case, the defendant by registering the said domain names which contain the word "Petronas" which has not only become a household name in Malaysia but is also well known internationally there is a serious issue to be tried in that the defendant is making a false representation to persons who consult the register that the registrant Araneum Consulting Services is connected or associated with the name registered and thus the owner of the goodwill in the name Petronas. Such persons would not know of the defendant and would believe that the defendant was connected or associated with the plaintiffs who are the owners of the goodwill in the said domain names. By registering the said domain names the defendant has eroded the exclusive goodwill in the name Petronas which damages the plaintiffs.

In my view the said domain names are instruments of fraud and any realistic use of them as domain names would result in passing off. This would cause irreparable injury and damage to the plaintiffs and by virtue of this the balance of convenience tilts in favour of the plaintiffs. Therefore, as the plaintiffs have provided an undertaking as to damages the interim injunction sought for ought to be granted.

The plaintiffs have sufficiently demonstrated that since the said domain names contain the word Petronas the court can assume that the intention of the defendant in using the said domain names is to deceive the public by passing off himself as part of the Petronas group of companies or his business or products as those of the plaintiffs.

In the circumstances of this case the court is satisfied that the plaintiffs have shown that there is a threat of passing off and trademark infringement on the defendant's part which is likely to cause confusion in the minds of the present and potential consumers of the plaintiffs' products thereby resulting in irreparable injury and damage to the plaintiffs' trade, business and goodwill.

In the premises, the court granted the *inter partes* prohibitory injunctions sought by the plaintiffs with costs in the cause.